

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
Connect America Fund) WC Docket No. 10-90

**REPLY COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON PUBLIC NOTICE DA 13-284 SEEKING FURTHER COMMENT ON ISSUES
REGARDING SERVICE OBLIGATIONS FOR CONNECT AMERICA PHASE II AND
DETERMINING WHO IS AN UNSUBSIDIZED COMPETITOR**

The American Cable Association (“ACA”) respectfully submits reply comments in response to the Wireline Competition Bureau’s Public Notice seeking comment on issues concerning implementation of the Connect America Fund (“CAF”) Phase II program.¹

In determining eligible areas for the Phase II program, the Commission should not lose sight of key touchstones upon which to base its actions. In seeking to bring broadband to unserved areas, the Commission correctly recognized in the *Connect America Fund Order* that support is not needed – and therefore should not be provided – in areas where a competitive provider already offers the qualifying broadband service.² Not only would provision of support in such areas undermine private sector investment to operate and expand broadband deployments but it would waste scarce government resources. Broadband offered by cable operators now covers the vast majority of locations in the country using high-quality DOCSIS platforms, and these providers are preparing to deploy the next generation of DOCSIS and expand their service

¹ See *Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations for Connect America Phase II and Determining Who is an Unsubsidized Competitor*, WC Docket No. 10-90, Public Notice, DA 13-284 (Feb. 26, 2013) (“Public Notice”).

² See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 145 (2011) (“*Connect America Fund Order*”), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011).

territories. As the President and Chief Executive Officer of BOYCOM Cablevision, a small cable operator,³ recently told the U.S. Senate Commerce Committee, “Our private investments have allowed us to offer broadband speeds comparable to those in urban areas. With new DOCSIS 3.0 technology, BOYCOM will cost-effectively deliver 100 Mbps over our existing networks and we continually seek to push our services to unserved markets wherever possible.”⁴ This is good news for rural consumers and for the Commission in seeking to target Phase II support.

In response to the comments filed by ACA and other parties – and consistent with the policy of not providing support in areas served by unsubsidized providers – ACA submits the Commission should adopt the following policies to determine eligible areas for the Phase II program:

1. The Commission should presume the National Broadband Map (“NBM”) is accurate and rely upon it in identifying eligible areas for Phase II support, even though it is a work in progress and contains inaccuracies. The reasons for this conclusion are many. First, the NBM is the most accurate and most granular representation of national broadband deployment that currently exists. Second, the federal government has already made a significant investment in the NBM, is seeking to further perfect its data, and clearly intends for it to be a key tool upon which to base its policies. As such, by presuming its accuracy, it will give providers an incentive to participate further in the data collection process. Third, a focused and

³ BOYCOM provides broadband service to approximately 3,000 subscribers in the foothills of the Ozark Mountains in Southeast Missouri.

⁴ Hearing on “State of Rural Communications” Before the Subcomm. on Communications, Technology and the Internet, S. Commerce Comm., 113th Cong. (April 9, 2013) (statement of Patricia Jo Boyers, President and Chief Executive Officer at BOYCOM Cablevision, Inc., Board Member of the American Cable Association).

administrable challenge process, such as that proposed by ACA,⁵ will enable the Commission to address inaccuracies in the NBM relatively expeditiously. ACA notes that in challenging designations by cable operators, price cap LECs will not face an unreasonable burden in making a prima facie case that an area is in fact unserved. In the normal course of business to attract customers, small cable operators post their service areas and broadband service offerings. All a price cap LEC needs to do is survey the operator's website and advertisements and, if necessary, call customer service. In contrast, it would be a much greater hardship for small cable operators, who lack regulatory staff and have already made the effort to be designated on the NBM, to bear the initial burden and start from the beginning to submit documents to ensure they are on the map.⁶ Moreover, an obligation on all cable operators, particularly smaller ones, to reaffirm their

⁵ ACA has proposed that the Commission refine its proposed challenge process and evaluation by –

1. Presuming the NBM is accurate and placing the initial burden on those challenging NBM designations.
2. Requiring a price cap local exchange carrier (“LEC”) at the time a challenge is filed to inform (via certified mail) providers designated as serving the “challenged” census block on the NBM.
3. Having the Commission determine whether the price cap LEC’s evidence for each census block is sufficient to make a prima facie case that the specific designation may be incorrect prior to seeking a rebuttal from the provider designated on the NBM.
4. Having the Commission publish a list of all census blocks that are potentially unserved because sufficient evidence was provided by the price cap LEC and asking for responses from the provider designated on the NBM.
5. Giving the provider designated on the NBM at least 40 days to respond.
6. In assessing evidence about whether a provider should be considered to be serving an area, requiring the Commission to include deployments that are actually in progress and where the provider has publicly announced that service will be available within a reasonable period.

⁶ The Commission has an obligation under the Regulatory Flexibility Act to take into account the resources available to small entities in establishing compliance and reporting requirements and, accordingly, adopt differing requirements or provide an exemption. *See* 5 U.S.C. § 603. The Commission also has an obligation under the Paperwork Reduction Act to “minimize the paperwork burden” for small businesses. *See* 44 U.S.C. § 3501. ACA notes that it has 675 members with fewer than 5,000 subscribers, and most of these operators offer broadband and would be affected by the challenge rules. ACA

service territory would not be narrowly tailored because many (if not most) cable operators operate in areas that are not potentially eligible for support.⁷ It would be far less burdensome for the price cap LECs to challenge first, in which instance only those operators who are challenged would need to reaffirm their presence. Fourth, developing a new map from scratch is an enormous undertaking, stressing and sapping the resources of government agencies and private providers, especially smaller providers. Even assuming that government agencies could even muster the resources to develop a new map, because of the time required and the obligation to comply with the Paperwork Reduction Act, the implementation of Phase II would be delayed.

2. For cable operators, the Commission should maintain 3 Mbps/768 kbps (“3/768”) as the proxy for determining whether a census block is served. Virtually all cable operators use a DOCSIS platform, which once deployed, permits them to easily ratchet up speeds, even if they are only initially providing service at 3/768.⁸ AT&T in its comments effectively recognized this fact, stating “We expect that a cable provider offering 3/768 is almost always capable of offering at least 4/1.”⁹ USTelecom’s comments provide a similar assessment, “The DOCSIS 2.0 technology which was released over a decade ago and other succeeding DOCSIS technologies are part of cable systems that are engineered to provide qualifying voice service and 4/1 Mbps

submits that in adopting rules to determine eligible areas for Phase II, the Commission has a responsibility to refrain from imposing burdensome data collection and production requirements on these small cable operators.

⁷ Even a voluntary obligation to reaffirm would be unfair to the extent that the Commission cannot provide cable operators with data and information in advance as to which of their service areas are potentially eligible areas.

⁸ ACA does not presume that a cable operator that is designated on the NBM as providing 3/768 but less than 6/1.5 Mbps is only offering the minimal speed service. In fact, ACA expects that, because of their use of the DOCSIS platform, many, if not most, were offering at least 4/1 Mbps but less than 6/1.5 Mbps service.

⁹ Comments of AT&T, WC Docket 10-90, at 6 (Mar. 28. 2013) (“AT&T Comments”).

broadband or better.”¹⁰ This means that cable operators meet the concern expressed by USTelecom and ITTA in their comments – that the reason to increase the proxy to 6/1.5 Mbps is to ensure that consumers will receive broadband at speeds of at least 4/1 Mbps.¹¹ In addition, by maintaining the proxy at 3/768 for cable operators, the Commission will spend scarce funds only where needed and will not discourage private investment in broadband facilities.

3. For cable operators, the Commission should presume that because they employ the robust DOCSIS platform they meet the latency requirement. Such a conclusion is supported by the Commission’s *Measuring Broadband America Report*.¹² It also is supported in the comments of AT&T, USTelecom, and ITTA.¹³ Further exploration of a cable system’s latency performance without clear and convincing evidence to the contrary would be unproductive for the Commission in carrying out its public interest mandate and for cable operators.

¹⁰ Comments of the United States Telecom Association, WC Docket No. 10-90 at 5 (Mar. 28, 2013) (“USTelecom Comments”). USTelecom also states, “If the Bureau declines to adopt the process we have proposed, we generally support the Bureau’s proposal that there should be a presumption – rebuttable through a challenge process – that a cable broadband provider meets the requirements to be an unsubsidized competitor.” *Id.* at 2-3. The California Public Utilities Commission “supports the Commission’s proposal to consider an area served by a cable provider with DOCSIS 3 or higher to be ‘served.’” Comments of the California Public Utilities Commission and the People of the State of California, WC Docket No. 10-90 at 5 (Mar. 28, 2013) (“CA PUC Comments”). The California Commission, however, does not discuss earlier versions of the DOCSIS platform, which are more than capable of supporting in the regular course of operations speeds in excess of 4/1 Mbps. *See e.g.* <http://en.wikipedia.org/wiki/DOCSIS>.

¹¹ *See* USTelecom Comments at 2; Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90 at 4 (Mar. 28, 2013). The California Public Utilities Commission (“California Commission”) also favors increasing the proxy speeds but does not address the issue that cable operators using a DOCSIS platform are almost certain to meet the speed threshold if they are shown on the NBM as providing 3/768. The California Commission’s position that the proxy should be increased so that more areas are covered is not sufficient reason to overbuild privately funded operators. *See* CA PUC Comments at 3-5.

¹² *See, e.g., 2013 Measuring Broadband America Report*, February Report, FCC’s Office of Engineering and Technology and Consumer and Governmental Affairs Bureau.

¹³ *See* AT&T Comments at 6; USTelecom Comments at 11; ITTA Comments at 8-9.

4. For cable operators, the Commission should presume that cable operators offer broadband service of at least 4/1 Mbps at a price and with data usage in rural “served” areas reasonably comparable to that offered in urban areas. This conclusion is based on a number of factors. First, in rural areas, cable operators face competition for broadband service from price cap LECs and wireless and satellite providers, most of whom operate nationally or regionally and set prices and terms of services on that basis. In these instances, ACA members, even those operating in limited territory, need to be responsive. In addition, many ACA members providing service in rural areas operate in many states and many urban areas in those states and set prices and terms of service accordingly. Finally, unlike voice service, broadband service is not a homogeneous product. Rather, price and performance cannot be separated, and, accordingly the Commission cannot determine whether a price is “reasonably comparable” without also examining performance. That is, the Commission should not find that a cable operator does not meet the price requirement for a 4/1 Mbps service if the price is above the national average but the performance exceeds that level. In this instance, the rural subscriber may be getting an excellent value – one that is superior to that of a mere 4/1 Mbps service. Moreover, because of the capabilities the DOCSIS platform, the Commission has good reason to presume that cable operators are able to offer service in any territory with the requisite (if not superior) price/performance attributes required by the public interest standard.

Not only are there strong reasons to presume cable systems are compliant with the public interest requirements unless proven otherwise by clear and convincing evidence, there are many reasons for the Commission to refrain from establishing (even minimal) comparable rates and terms of service for the provision of broadband service by cable operators to be deemed as “serving” an area. First, the Commission should recognize that cable operators as a rule build

their networks and provide broadband service with no government support, only using private capital and based on a business case enabling them to receive a market return on that investment. Any effort by the government to impose price or usage allowances – that is regulate the service – has great potential to lower that return and slow rural broadband deployment. With universal service funding limited, this would lessen the ability for the Commission to achieve its objective of bringing broadband to unserved areas.

Further, it would be almost impossible to establish a reasonably comparable rate and terms of service because, at least for cable operators, these change so often and are usually offered in bundles with other services. Most cable customers subscribe to either or both a package of services and some sort of promotional offering. Further, bundles are far from homogenous and operators change frequently. All of this makes it virtually impossible to have valid urban-rural comparisons. ACA notes that the Commission has recognized this problem and just rejected surveying bundled prices in its recent “Urban Rate Survey” order, noting that “carriers today typically have discretion in how they allocate the price of a bundle among the services making up the bundle.”¹⁴ Finally, if it were to establish a comparable rate and terms of service for broadband, the Commission would be acting in an area where it clearly lacks authority.

¹⁴ *Connect America Fund*, WC Docket No. 10-90, Order, DA 13-598, ¶ 14 (rel. Apr. 3, 2013).

Respectfully submitted,



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